DISTRIBUTED
APR 18 '77

Supreme Court, U. S.
FILED
APR 18 1977
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1976
No. 76-1098

MARATHON OIL COMPANY,
Petitioner,

vs.

FEDERAL ENERGY ADMINISTRATION, et al.,
Respondents.

On Petition For A Writ Of Certiorari
To the Temporary Emergency Court of Appeals
of the United States

REPLY BRIEF FOR PETITIONER

ROBERT B. GOSLINE
Suite 500, 811 Madison Ave.
Toledo, Ohio 43624

J. FURMAN LEWIS
Marathon Oil Company
Findlay, Ohio 45840

Counsel for Petitioner

Of Counsel:

SHUMAKER, LOOP & KENDRICK
John W. Hackett, Jr.
Thomas G. Pletz
David W. Wicklund
Suite 500, 811 Madison Ave.
Toledo, Ohio 43624

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1976
No. 76-1098

MARATHON OIL COMPANY,
Petitioner,

vs.

FEDERAL ENERGY ADMINISTRATION, et al.,
Respondents.

On Petition For A Writ Of Certiorari
To the Temporary Emergency Court of Appeals
of the United States

REPLY BRIEF FOR PETITIONER

In their brief in opposition, Respondents seem to concede the basic merits of Petitioner's contentions. They seek to avoid the effect of such concessions, however, by assumptions, inferences and conclusions which are unwarranted, unreasonable or unsupported in the record. For these reasons, Petitioner feels compelled to reply.

I.

Respondents concede that " * * * the Allocation Act does not expressly refer to credit terms or payment schedules in its delegation of authority * * * ". [Respondents' Brief, p. 11.] But they argue that

such authority must necessarily be inferred if frustration of the agency's allocation program is to be avoided. They argue that "suppliers could disrupt the allocation of those products as readily by changing credit terms and payment schedules as by raising prices." [Respondents' Brief, p. 12.]

Petitioner submits that there is no showing in the record that increases in the price of credit would any more "disrupt the allocation" of products than would increases in the price of rent or any other cost of doing business. As a matter of fact, the opposite is true. Furthermore, the court below itself ruled in Shell Oil Co. v. Federal Energy Administration, 527 F.2d 1243 (T.E.C.A. 1975), that such a resulting frustration of the allocation program was no ground for regulating rent as an inseparable part of price.

The fallacy of Respondents' argument is made pointedly clear by a consideration of the effects of a refusal by a supplier to renew a lease to a customer. If a supplier refused to renew a lease to a dealer, for example, the dealer's allocation right could be effectively frustrated. Such was the situation in Guyer v. Cities Service Co., 381 F. Supp. 7 (E.D. Wis. 1974). There, in an opinion approved by the Court below in Atlantic-Richfield Co. v. Zarb, 532 F.2d 1363 (T.E.C.A. 1976), the district court held that the fact that the allocation rights of service station dealers might be frustrated by the termination of leases by their supplier did not warrant extending, by implication, the reach of the Emergency Petroleum Allocation Act (the Allocation Act) to an area not explicitly covered by the act.

By comparison, an increase in the cost of credit or the elimination of credit by a supplier could not have such an effect. The purchaser, by obtaining credit in the free credit market and paying cash for the allocated product, could continue to exercise his allocation rights.

II.

Respondents concede that " * * * the regulation affords [a] supplier flexibility to adjust its credit arrangements with particular purchasers [within the same class of purchasers] based on the same factors that had been applied in the base period". [Respondents' Brief, p. 15.] However, they argue that the supplier may only look backward at past credit practices and may not look currently at purchasers for the purpose of forming judgments as to present "credit worthiness or other nondiscriminatory factors * * * ."

This is totally unrealistic and arbitrary. It necessarily means that the seller must adhere to past credit terms no matter how unworthy a customer may have become since 1973 and no matter what "other nondiscriminatory factors" might currently exist or arise in the future.

Respondents' attempt to regulate credit as a part of product price is nothing more than an administrative maneuver to shift the burden of proof from the agency to the industry. In other words, each and every new judgment requiring more stringent credit terms is presumed to be in violation of the regulation, unless and until the seller proves otherwise.

Even the court below has declined to condone such arrogance. In the Shell case, that court told the government in no uncertain terms that the burden of proof remained with the agency under its enforcement powers to establish that rental adjustments had been used as a means of circumventing the pricing regulations of the Allocation Act. This Court should do no less with respect to credit terms.

III.

Respondents concede that the regulations preclude the industry from meeting fairly and competitively the normal fluctuations which occur in an uncontrolled credit market. [Respondents' Brief, pp 9, 10.] They argue, however, that such inequity is justified because of the historical practice of the petroleum industry to extend more favorable credit terms than its purchasers could obtain in the open credit market. There is absolutely no support in the record on appeal for this assertion and it is an unwarranted assumption.

IV.

Respondents' effort to distinguish Craig v. Sun Oil Co. [Respondents' Brief, Note #9, pp. 10, 11] is in fact self-defeating. The court there made eminently clear that only discrimination in credit terms "of sufficient magnitude or nature" might constitute a violation of the Robinson-Patman Act, but that differences of ordinary proportions would not.

This is Petitioner's precise point in the instant case. If, given sufficient economic power over credit, inordinate credit terms were imposed "of

sufficient magnitude or nature" as to constitute a circumvention of the F.E.A.'s pricing authority, then such action might "constitute an action" warranting enforcement proceedings by the agency. But Respondents, in seeking to require the industry to justify every minute adjustment in credit terms, are putting the cart before the horse. Moreover, their theory would result in precisely the same sort of administrative difficulties they imagine would be presented by Petitioner's contention that Respondents should resort to the general prohibition in 10 C.F.R. Section 210.62(c) against practices designed to circumvent the regulations.

Respondents' basic premise is that the F.E.A. must regulate credit terms in order adequately to regulate the prices of covered products. They attempt to demonstrate this theory by example: "Consider a supplier who in May, 1973 permitted a class of purchasers to pay for products thirty days after delivery without interest. For that supplier now to require that class of purchasers to pay 'interest' at the rate of 12% per annum on payment made after delivery is functionally equivalent to raising the price 1% and offering a 1% discount to those who pay on delivery. To the extent a purchaser's cash flow or other circumstances make it impractical for him to pay on delivery, the imposition of an interest charge for what was formerly a customary allowance constitutes an effective increase in price for the product." [Respondents' Brief, p. 8.]

This example implies, however, that the converse would be true. For example, a supplier could in 1977 offer to a class of purchasers substantially less

stringent credit terms than during the 1973 base period. Under Respondents' rationale, the supplier could raise the price of the product above the ceiling price by an amount corresponding to the economic equivalent of the reduction in the base period credit terms.

This certainly would be a logical extension of the Respondents' theory that product price and credit terms are inseparable for regulatory purposes. However, if this extension is justified, then the F.E.A. would be required to examine every price change on an ad hoc basis to insure consistency with the accompanying changes in credit. This is precisely the sort of case-by-case review Respondents seek to avoid.

V.

Respondents assert that the challenged regulation deals only with credit terms related to the sale of allocated products. [Respondents' Brief, pp. 10 through 11 and 14.] But they then say that a wide assortment of credit arrangements are used in such sales. [Respondents' Brief, Note #10, p. 11.] It is unclear whether Respondents intend to abandon their contention in both courts below that the challenged regulation encompasses all credit transactions within the industry, whether connected with the sale of covered products or otherwise. Their failure to address this issue in unambiguous terms may have to be viewed as an effort to camouflage their true position and to mislead the Court as to the asserted scope of the challenged regulation.

CONCLUSION

For these additional reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT B. GOSLINE
Suite 500, 811 Madison Ave.
Toledo, Ohio 43624

J. FURMAN LEWIS
Marathon Oil Company
Findlay, Ohio 45840

Counsel for Petitioner

Of Counsel:

SHUMAKER, LOOP & KENDRICK
John W. Hackett, Jr.
Thomas G. Pletz
David W. Wicklund
Suite 500, 811 Madison Ave.
Toledo, Ohio 43624